

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE UNITED STATES POSTAL
SERVICE PRIVACY ACT LITIGATION

CASE NO. MD08-1937JLR

ORDER ON MOTION TO
DISMISS

This matter comes before the court on the United States Postal Service's ("Postal Service") motion to dismiss (Dkt. # 39) pursuant to Federal Rule of Civil Procedure 12(b), subsections (1) and (6). The court has reviewed the materials filed in support and in opposition of the motion, heard the argument of counsel, and for the following reasons GRANTS in part and DENIES in part the motion.

I. BACKGROUND

This is a putative nationwide class action involving almost 800,000 Postal Service employees. Plaintiffs claim that the Postal Service violated the Privacy Act by improperly disclosing the names and addresses of its employees to market co-branded products to them at their home addresses. They also argue that the Postal Service was unjustly enriched, and seek disgorgement of more than \$8.5 million in profit, as well as statutory damages under the Privacy Act. The Postal Service admits that it engaged in

1 direct marketing of co-branded products and services to its employees. The Postal
2 Service contends, however, that the co-branding does not violate the Privacy Act and its
3 actions are not unjust.

4 In their consolidated complaint, Plaintiffs assert that the Postal Service, which is
5 the second-largest employer in the United States, violated the Privacy Act by selling its
6 employee master file, containing personal, private employee information, including “the
7 complete home address database of all career and non-career, full and part-time
8 employees.” (Consol. Compl. (Dkt. # 35) ¶ 8.) According to Plaintiffs, the Postal
9 Service’s disclosure of information is evidenced by the Postal Service’s “Strategic
10 Business Initiatives Plan, Management Instruction - AS-333-2004-7,” a postal regulation
11 that allows private businesses to access and utilize for profit the Postal Service’s
12 employee master file. (*Id.*) Indeed, Plaintiffs allege that the Postal Service permits
13 private corporations to submit competitive bids for co-branding and other types of
14 marketing agreements using the employee master file. (*Id.* at ¶ 9.) Plaintiffs complain
15 that all of this is done without the Postal Service employee’s approval, consent, or
16 knowledge. (*Id.* at ¶ 52.) And, while the Postal Service receives an economic benefit
17 from selling this information, the employees do not receive any compensation or other
18 form of remuneration. (*Id.*)

21 Plaintiffs assert two causes of action: violations of the Privacy Act and unjust
22 enrichment. Of significant import to this motion, Plaintiffs request the following
23 remedies:

25 (1) declaratory and injunctive relief pursuant to the Administrative Procedures
Act (“APA”), 5 U.S.C. § 706(2)(A);

26 (2) recovery of the amounts by which the Postal Service has been unjustly
27 enriched; and

1 (3) costs and reasonable attorney's fees under the Privacy Act, 5 U.S.C.
2 552a(g)(4)(B) and the Equal Access to Justice Act, 28 U.S.C. § 2412(a) and
(d).

3 (Consol. Compl. at ¶ 22). Absent from their prayer for relief is compensation for any
4 actual damages suffered by Plaintiffs. (*Id.*) Also, although Plaintiffs request APA relief,
5 they did not, and cannot, bring an APA claim against the Postal Service. (*Id.*)

6 The Postal Service moves to dismiss the consolidated complaint on two grounds.
7 First, the Postal Service contends that, even if Plaintiffs could plead a viable Privacy Act
8 claim, they have not alleged that they suffered any "actual damages" as a result of the
9 alleged violation. Second, with respect to the unjust enrichment claim, the Postal Service
10 first contends in its opening brief that it is not subject to suit for an unjust enrichment
11 claim because it has not waived its sovereign immunity. (Mot. (Dkt. # 39) at 10.) The
12 Postal Service subsequently conceded, however, that Congress had waived its sovereign
13 immunity when it enacted the Postal Reorganization Act ("PRA"). (*See* Tr. (Dkt. # 51) at
14 11.) The Postal Service now claims that Plaintiffs' unjust enrichment claim should be
15 dismissed because it is an attempt to usurp the statutory framework of the Privacy Act and
16 is therefore not a proper application of the federal common law. (Reply (Dkt. # 45) at
17 11.)

18 II. ANALYSIS

19 The Postal Service brings this motion pursuant to Rule 12(b)(1) for lack of subject
20 matter jurisdiction and Rule 12(b)(6) for failure to state a claim pursuant to the Federal
21 Rules of Civil Procedure. A complaint must be dismissed under Federal Rule of Civil
22 Procedure 12(b)(1) if, considering the factual allegations in the light most favorable to the
23 plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the
24 United States, or does not fall within one of the other enumerated categories of Article III,
25 Section 2, of the Constitution; (2) is not a case or controversy within the meaning of the
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1 Constitution; or (3) is not one described by any jurisdictional statute. *Baker v. Carr*, 369
2 U.S. 186, 198 (1962); *D.G. Rung Indus., Inc. v. Tinnerman*, 626 F. Supp. 1062, 1063
3 (W.D.Wash. 1986); *see* 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1346
4 (United States as a defendant). When considering a motion to dismiss pursuant to Rule
5 12(b)(1), the court is not restricted to the face of the pleadings, but may review any
6 evidence to resolve factual disputes concerning the existence of jurisdiction. *McCarthy v.*
7 *United States*, 850 F.2d 558, 560 (9th Cir. 1988), *Biotics Research Corp. v. Heckler*, 710
8 F.2d 1375, 1379 (9th Cir. 1983). A federal court is presumed to lack subject matter
9 jurisdiction until plaintiff establishes otherwise. *Stock West, Inc. v. Confederated Tribes*,
10 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, the plaintiff bears the ultimate burden of
11 proving the existence of subject matter jurisdiction. *Stock West*, 873 F.2d at 1225;
12 *Thornhill Publ'g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

13 When considering a motion to dismiss under Rule 12(b)(6), the court construes the
14 complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v.*
15 *Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all
16 well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff.
17 *Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998). The
18 court's review of the record on a Rule 12(b)(6) motion is generally limited to the
19 complaint itself. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). The court may,
20 however, rely on facts subject to judicial notice. *States v. Ritchies*, 342 F.3d 903, 908
21 (9th Cir. 2003). For instance, the court may consider a plaintiff's clarifications in their
22 briefing and at oral argument. *Pegram v. Herdich*, 530 U.S. 211, 230 n.10 (2000) (citing
23 *Alicke v. MCI Commc'ns Corp.*, 111 F.3d 909, 911 (D.C. Cir. 1997) (citations omitted),
24 in which the court relied on statements in oral argument to clarify complaint).

1 A court can dismiss an action under Rule 12(b)(6) where the plaintiff fails to allege
2 either a cognizable legal theory or sufficient facts in support of a cognizable legal theory.
3 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While a complaint
4 need not contain detailed factual allegations, a plaintiff's obligation to provide the
5 grounds entitling him to relief requires more than mere labels and conclusions, and a
6 formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v.*
7 *Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). The complaint
8 must plead "enough facts to state a claim to relief that is plausible on its face." *Id.*
9 Specific facts are not necessary. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116,
10 1121-22 (9th Cir. 2008) (citations omitted). The complaint need only advise the
11 defendant of what the claim is and the grounds upon which it rests. *Id.* (applying
12 *Twombly* to a complaint alleging a civil rights violation pursuant to 42 U.S.C. § 1981).
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14 **A. Subject Matter Jurisdiction**

15 The court first determines whether it has subject matter jurisdiction over this
16 lawsuit. As stated above, the Postal Service took the position in its motion to dismiss that
17 this court did not have subject matter jurisdiction over the unjust enrichment claim
18 because the Postal Service had not waived its sovereign immunity. (Mot. at 10.) In its
19 reply brief, however, the Postal Service changed its argument on the unjust enrichment
20 claim. In its reply, the Postal Service contends that Plaintiffs fail to state a claim because
21 they seek to obtain additional remedies that go beyond the remedies granted to plaintiffs
22 by the Privacy Act. (Reply at 11.) Subsequently, at oral argument on the Postal Service's
23 motion, it conceded that the court had jurisdiction over the unjust enrichment claim. (Tr.
24 at 11.) The court agrees that Congress waived the Postal Service's sovereign immunity in
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1 the PRA.¹ With respect to the argument raised by the Postal Service in its reply
2 memorandum, it is well established in this circuit that courts will not consider new
3 arguments raised for the first time in a reply brief. *Lentini v. Cal. Ctr. for the Arts,*
4 *Escondido*, 370 F.3d 837, 843 n.6 (9th Cir. 2004). The court therefore finds that it has
5 subject matter jurisdiction over the unjust enrichment claim and declines to consider the
6 Postal Service's alternative argument. The court is persuaded that Plaintiffs did not have
7 a fair opportunity to address the Postal Service's latter argument in their briefing or at
8 oral argument.
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10 The Postal Service also moves to dismiss Plaintiffs' APA claim on the basis that
11 this court lacks subject matter jurisdiction over this claim. The court agrees that the APA
12 does not apply to the Postal Service. There is no ambiguity in the text of 39 U.S.C. §
13 410(a), which provides that the judicial review provisions of the APA do not apply to the
14 exercise of the powers of the Postal Service. The Ninth Circuit has also held that the
15 APA does not apply to the Postal Service. *See Currier v. Potter*, 379 F.3d 716, 725 (9th
16 Cir. 2003). Even though the APA, 5 U.S.C. § 706, generally subjects agency actions to
17 judicial review, the PRA specifically exempts the Postal Service from such review.
18 Under the PRA, "no Federal law dealing with public or Federal contracts, property,
19 works, officers, employees, budgets, or funds, including the provisions of chapters 5 and
20 7 of title 5 [i.e., the APA administrative procedures and judicial review provisions], shall
21 apply to the exercise of the powers of the Postal Service." 39 U.S.C. § 410(a)); *see also*
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24 ¹ The PRA was enacted in 1970 and established the Postal Service as a quasi-public
25 entity that was to compete on essentially level ground with private enterprise. To that end,
26 section 401(1) provides that the Postal Service can "sue and be sued," generally waiving the
27 immunity from suit it would otherwise have as a public entity. 39 U.S.C. § 401(1); *see also*
28 *Loeffler v. Frank*, 486 U.S. 549, 556 (1988) ("By launching 'the Postal Service into the
commercial world' and including a sue-and-be-sued clause in its charter, Congress has cast off
the Service's 'cloak of sovereignty' and given it the 'status of a private commercial
enterprise.'").

1 *Air Courier Conf. of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 921
2 (1991) (J. Stevens, J. Marshall, and J. Blackmun concurring).

3 Plaintiffs contend, however, that they are not asserting an APA claim against the
4 Postal Service, only borrowing the APA's statutory remedies. As discussed below,
5 however, the court finds that the Privacy Act does not contemplate nor permit the
6 "borrowing" of remedies from the APA. The court denies the Postal Service's argument
7 that this court lacks subject matter jurisdiction over Plaintiffs' unjust enrichment claim.
8 The court also determines that the APA does not apply to the Postal Service.
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10 **B. Actual Damages From the Postal Service's Disclosure of Personal**
11 **Information**

12 To recover for actual damages under the "wrongful disclosure" provisions of the
13 Privacy Act, Plaintiffs must ultimately establish (1) that the disclosed information was
14 contained in a system of records; (2) that the Postal Service disclosed the information
15 improperly; (3) that the disclosure resulted in an adverse effect on Plaintiffs; and (4) that
16 the disclosures were willful and intentional. *Doe v. Chao*, 540 U.S. 614, 622-23 (2004);
17 *Quinn v. Stone*, 978 F.2d 126, 121 (3d Cir. 1992); *Stafford v. SSA*, 437 F. Supp. 2d 1113,
18 1117-1118 (N.D. Cal. 2006); *Fort Hall Landowners Alliance, Inc. v. Bureau of Indian*
19 *Affairs*, 407 F. Supp. 2d 1220, 1223 (D. Idaho 2006). Assuming Plaintiffs could meet all
20 the elements of a Privacy Act claim, they do not allege any damage other than for what
21 they consider to be a misappropriation of their right to sell their own personal
22 information.
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24 Plaintiffs do not allege any out-of-pocket, pecuniary, or even emotional damages.
25 They claim that the Postal Service's gain constitutes their "actual damages." Plaintiffs
26 appear to request a form of restitution that is not actual damages but equitable relief.
27 Plaintiffs state that their "actual damages" are equal to, and measured by the amount of
28 the Postal Service's profit. This, however, is a claim for a money award of restitution, an

1 equitable remedy for obtaining unjust profits. It is not a claim for damages. “Damages
2 begins with the aim of compensation for plaintiff. Restitution, in contrast, begins with the
3 aim of preventing unjust enrichment of the defendant.” Dobbs, Law of Remedies, Second
4 Ed., § 3.1.

5 At oral argument, Plaintiffs’ counsel argued that the remedy Plaintiffs seek is not
6 restitution. (Tr. at 30.) Rather, Plaintiffs seek the value of their name and addresses; the
7 remuneration paid to the Postal Service was just one way to value this personal
8 information. (*Id.*) The theory appears to be that each Postal Service employee should
9 have received compensation for the value of their personal address.² This theory,
10 according to Plaintiffs’ counsel, is akin to the tort of misappropriation. (*Id.* at 15 (arguing
11 that “the use of [the employee’s address], as the Postal Service is using it, which is
12 basically to take the property right that any one of us would have in our name and
13 address, and that these employees have in their names and addresses, to appropriate that
14 property right that is inherent and to sell it to some third party”).) Yet, Plaintiffs concede
15 that they are not asserting the tort itself only borrowing its remedies.

16 Plaintiffs quote the discussion of the nature of restitution purportedly found at
17 “section 4.11, at page 369” of Dobbs, Law of Remedies, Second Ed. (Tr. at 31.) Section
18 4.11 does not exist and page 369 is a discussion of the payment date rule. The discussion
19 of restitution found in Chapter 4 of Dobbs does not support Plaintiffs’ theory. According
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23 ² Plaintiffs explain that their “actual damages,” as a result of the Postal Service’s
24 conduct, is equal to the money paid to the Postal Service by the credit-card companies,
25 cell-phone companies, and any others who have paid the Postal Service for the disclosure and
26 use of its employee master list. “The money, reflective of the value of those employees’ names
27 and personal addresses, belongs to the employees, not their employer, and [cannot be disclosed]
28 without ‘prior written consent’ as the [Privacy Act] requires.” (Consol. Compl. ¶ 58.) The court
questions whether there is value in one personal address or whether the only inherent value is in
the compilation of personal addresses. Nevertheless, the court need not resolve this issue given
its dismissal of Plaintiffs’ Privacy Act claim.

1 to Dobbs, “[r]estitution measures the remedy by the defendant’s gain and seeks to enforce
2 disgorgement of that gain. It differs in its goal or principle from damages, which
3 measures the remedy by the plaintiff’s loss and seeks to provide compensation for that
4 loss.” Dobbs, § 4.1(1). Thus, Dobbs’ discussion of the difference between actual
5 damages and restitution contradicts Plaintiffs’ theory. That is, Plaintiffs’ measurement of
6 damages as equal to the amount of the Postal Service’s gain fits squarely in the definition
7 of restitution. While Dobbs suggest that, in some cases, a plaintiff may be able to claim
8 either restitution or damages, whichever is more advantageous, he does not suggest that
9 restitution may be used to supplant the statutory requirement for actual damages.
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11 Whether we call Plaintiffs’ theory of damages a claim for restitution or actual
12 damages, the central question before the court is whether the Privacy Act contemplates
13 damages of this nature. The Postal Service correctly notes that if Congress wanted to
14 include damages of the sort proposed by Plaintiffs, it could have added that phrase to the
15 Privacy Act. Instead, the Privacy Act provides for compensation of only “actual
16 damages.” 5 U.S.C. § 552a(g)(4)(A). Moreover, the question of whether to include more
17 extensive types of damages was discussed prior to the Privacy Act’s enactment and was
18 rejected. In *Doe v. Chao*, the Supreme Court addressed a very similar issue. In that case,
19 the plaintiff’s social security number was disclosed by the Department of Labor but he
20 could not show that he suffered in any meaningful way. 540 U.S. at 616. In denying the
21 plaintiff’s claim for statutory damages, the Supreme Court explained the history and
22 purpose of the Privacy Act:
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25 An uncodified section of the Act established a Privacy Protection Study
26 Commission, which was charged, among its other jobs, to consider
27 “whether the Federal Government should be liable for general damages
28 incurred by an individual as the result of a willful or intentional violation
of the provisions of sections 552a(g)(1)(C) or (D) of title 5.” 88 Stat.
1907. Congress left the question of general damages, that is, for another
day. Because presumed damages are therefore clearly unavailable, we
have no business treating just any adversely affected victim of an

1 intentional or willful violation as entitled to recovery, without something
2 more.

3 540 U.S. at 620.

4 This case is different from *Doe* in that the Postal Service sold Plaintiffs' personal
5 information and therefore gained a financial benefit from the alleged unlawful disclosure.
6 Even given the commercial nature of the Postal Services alleged violation, the Supreme
7 Court was clear in its holding that the guarantees of the Privacy Act only flow toward
8 those who suffer actual damages. In adopting the Privacy Act, Congress had to balance
9 its goal of protecting the right of privacy with its concern regarding the potential drain on
10 the public fisc. *See e.g.*, 120 Cong. Rec. at 36,659 (Rep. McCloskey: "we are trying to
11 balance two great interests here. We are trying to balance the necessity of balancing the
12 budget, and we are trying to protect the Government from undue liability.").

13 Here, the Privacy Act does not support forcing the Postal Service to disgorge
14 millions of dollars in contract fees with co-branding companies when the individuals
15 affected by the violation cannot show that they were damaged in any way. After all, "tort
16 recovery requires not only a wrongful act plus causation reaching to the plaintiff, but
17 proof of some harm for which damages can reasonably be assessed." *Doe*, 540 U.S. at
18 621. Accordingly, the court dismiss Plaintiffs' claim for a violation of the Privacy Act
19 because Plaintiffs fail to allege any actual damages as a result of the Postal Service's
20 alleged violation of the act.

23 **C. Use of the APA to Enjoin the Postal Service**

24 As explained above, Plaintiffs have not alleged a cause of action under the APA,
25 but instead simply pray for equitable relief under § 704 of the APA for violations of the
26 Privacy Act ("[a]gency action made reviewable by statute"). The Privacy Act does not
27 provide for injunctive or other forms of equitable relief. Plaintiffs contend that the court
28 has the authority to issue an injunction under the APA which provides authority for

1 injunctive relief to halt agency action that is “not in accordance with the law.” 5 U.S.C. §
2 706(2)(A).

3 The APA, however, cannot be used to confer authority to grant relief if “any other
4 statute that grants consent to suit expressly or impliedly forbids the relief which is
5 sought.” 5 U.S.C. § 702. Here, the Privacy Act implicitly forbids the type of equitable
6 relief Plaintiffs seek. 5 U.S.C. § 552a(g)(4)(A). Indeed, even Plaintiffs concede that the
7 Ninth Circuit has held that the Privacy Act prohibits injunctive relief for their claims.
8 (Resp. at 12 n.6.) The court therefore concludes that the Plaintiffs cannot use the
9 equitable remedies available under the APA to expand the remedies currently prohibited
10 by the Privacy Act.

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12 **D. Unjust Enrichment Claim**

13 Finally, Plaintiffs claim that the Postal Service’s financial gain from selling the
14 employee master file amounts to a claim for unjust enrichment under federal common
15 law. Specifically, in their consolidated complaint, Plaintiffs contend that the Postal
16 Service “received monies from private corporations who entered into co-branding or other
17 marketing agreements with them, in exchange for the unlawful use of its employees’
18 personal, private information.” (Consol. Compl. ¶ 83.) And, that it would be “inequitable
19 for the [Postal Service] to retain these ill-gotten financial gains without paying the value
20 of said gains to the Plaintiffs and the Class.” (*Id.* at ¶ 85.)

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22 As discussed above, the Postal Service moved to dismiss this claim on two
23 theories. First, that the Postal Service is immune from suit; and second, that the remedies
24 found in the Privacy Act preclude an unjust enrichment claim. The court previously
25 rejected both of these arguments. Thus, Plaintiffs’ claim for unjust enrichment shall
26 proceed.
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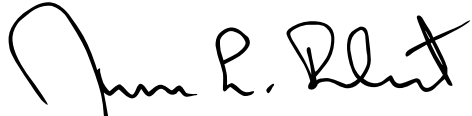
1 The court notes, however, that neither the Plaintiffs who brought this claim, nor the
2 Postal Service that moved to dismiss it, could identify the elements of a federal common
3 law claim for unjust enrichment. Plaintiffs rely on a Second Circuit case from 1946
4 applying New York law of unjust enrichment as authority for the proposition that the case
5 before the court is a “textbook case of unjust enrichment.” (Resp. at 21 (Dkt. # 44) citing
6 *Matarese v. Moore-McCormack Lines*, 158 F.2d 631, 634 (2d Cir. 1946).) The court in
7 *Matarese*, however, did not discuss the federal common law claim of unjust enrichment
8 but relied entirely on New York law. Because neither party discusses the federal common
9 law nor do they discuss the implication of applying various states’ laws on unjust
10 enrichment to this class action, the court questions whether such a claim is legally
11 cognizable. Nevertheless, because the Postal Service failed to move to dismiss the claim
12 on this basis, the court must leave the resolution of this issue for a later date.

13 14 15 **III. Conclusion**

16 For the reasons stated, the court GRANTS in part and DENIES in part the Postal
17 Service’s motion to dismiss (Dkt. # 39).

18 DATED this 23rd day of March, 2009.

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JAMES L. ROBART
United States District Judge